**Appeal No. 03-2527** **Cir. Ct. No. 01CV000179**

**WISCONSIN COURT OF APPEALS**
**DISTRICT III**

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**LEROY M. STRENKE AND JUANITA M. STRENKE,**

**PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,**

**V.**

**LEVI HOGNER AND NAU COUNTRY INSURANCE COMPANY,**

**DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT.**

**FILED**

**May 18, 2004**

Cornelia G. Clark
Clerk of Supreme Court

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## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Cane, C.J., Hoover, P.J., and Peterson, J.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court to determine the following issues:

1. What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in WIS. STAT. § 895.85(3)? [1]

[1] WISCONSIN STAT. § 895.85(3) states:

(continued)

a. If ***Wischer v. Mitsubishi Heavy Industries America, Inc.***, 2003 WI App 202, ¶40, 267 Wis. 2d 638, 673 N.W.2d 303, *review granted*, (Wis. April 20, 2004) (Nos. 01-0724, 01-1031 & 01-2486), is correct, are there sufficient facts from which a jury could conclude Levi Hogner was aware his acts were "practically certain" to cause injury?

2. Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?

3. If there was sufficient evidence to submit a punitive damages question to the jury, is the jury's punitive damage award excessive or a violation of Hogner's due process rights?

4. Are compensatory and punitive damages separate claims, susceptible to bifurcation?

On October 16, 1998, Levi Hogner drove his vehicle while intoxicated and caused an accident that injured LeRoy Strenke. Hogner's blood alcohol content was .269%. He was charged with and pled no contest to operating a motor vehicle while intoxicated, fifth offense. On May 10, 2001, LeRoy and Juanita Strenke sued Hogner for negligence, seeking compensatory and punitive damages. Hogner stipulated to liability, but disputed the Strenkes' damages.

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The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The trial court granted Hogner's motion to bifurcate the punitive damages claim from the compensatory damages claim. The jury later awarded the Strenkes $2,000 in compensatory damages.

As to the punitive damages claim, Hogner admitted he had four OWI convictions prior to this incident, but indicated he never injured anyone in any of those previous cases. Hogner further admitted he consumed sixteen to eighteen twelve-ounce containers of beers within a five-hour span that night,[2] but denied he intended to injure anyone.

At the close of testimony, Hogner moved for a directed verdict, arguing the Strenkes did not present a prima facie case that Hogner acted maliciously toward LeRoy or intentionally disregarded LeRoy's rights. The court denied the motion, concluding that while Hogner did not act maliciously toward LeRoy, a jury could conclude Hogner intentionally disregarded LeRoy's rights. The court determined LeRoy was a member of a class of motorists that had rights. It concluded a jury could find Hogner's intentional acts of drinking sixteen to eighteen twelve-ounce containers of beer and then driving while intoxicated, coupled with the fact that he had four prior OWI convictions, created a practical certainty that LeRoy's rights would be disregarded. In closing arguments, the Strenkes asked for $25,000 in punitive damages, but the jury awarded $225,000.

On appeal, the Strenkes concede they are not claiming punitive damages on the ground the Hogner acted maliciously toward LeRoy. Thus, the inquiry is limited to whether Hogner intentionally disregarded LeRoy's rights.

[2] Hogner, a male, weighed 400 pounds at the time of the incident.

## I. "INTENTIONAL DISREGARD OF THE RIGHTS OF THE PLAINTIFF"

In ***Wischer***, 267 Wis. 2d 638, ¶¶40-41, we rejected the notion that a mere volitional act was sufficient to constitute an "intentional disregard" of the plaintiff's rights. Relying on a committee note accompanying WIS JI—CIVIL 1707.1 and on WIS JI—CIVIL 2001, we held that to intentionally disregard the plaintiff's rights unambiguously required the defendant to have (1) a general intent to perform an act, and (2) either (i) a specific intent to cause injury by that act or (ii) knowledge that the act is practically certain to result in injury. ***Id.***, ¶¶39, 40. Relying on ***Wischer***, Hogner argues his intentional, volitional acts of drinking a large quantity of alcohol and then driving, regardless of his prior OWI convictions, is not sufficient to prove he intentionally disregarded LeRoy's rights.

As indicated above, the Wisconsin Supreme Court accepted the petition to review the ***Wischer*** case. The issue before the court is, "What proof is required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in [WIS. STAT. § 895.85(3)]." *Available at* WISCONSIN SUPREME COURT TABLE OF PENDING CASES, http://www.wicourts.gov/html/sc/SCCASES.htm (last modified May 13, 2004). This same issue is implicated here. However, in this case, as opposed to ***Wischer***, the underlying circumstances involve a criminal act, specifically operating a motor vehicle while intoxicated, fifth offense; an act that under the common law "outrageous" standard for punitive damages could support a punitive damages award if it was a cause of an accident. *See* ***Lievrouw v. Roth***, 157 Wis. 2d 332, 347, 459 N.W.2d 850 (Ct. App. 1990).

Assuming ***Wischer*** correctly interpreted WIS. STAT. § 895.85(3), the issue then becomes whether the facts of this case satisfy the requirement of

"knowledge that the act is practically certain to result in injury." ***Wischer***, 267 Wis. 2d 638, ¶40. As to "practical certainty," in ***Boomsma v. Star Transport, Inc.***, 202 F. Supp. 2d 869, 881 (E.D. Wis. 2002), the Eastern District of Wisconsin construed WIS. STAT. § 895.85 and concluded a practical certainty is something approaching the inevitable. If ***Boomsma***'s interpretation correctly states the law, is it approaching the inevitable that a person with four previous OWI convictions, none of which caused injury to anyone, who drives with a .269% blood alcohol concentration, will cause injury? As to the "knowledge" requirement, the district court in ***Boomsma*** concluded, "A jury may not consider whether the defendant 'ought to have been aware' of the potential for a certain outcome." ***Id.*** Is ***Boomsma*** correct that the statute requires actual, subjective awareness of the practical certainty? Supposing ***Boomsma***'s interpretation is proper, can knowledge be imputed to Hogner as a matter of law on account of his prior OWI convictions and high BAC on the night of the accident?

## II. THE DEFENDANT'S CONDUCT AND THE SPECIFIC PLAINTIFF SEEKING PUNITIVE DAMAGES

Also as opposed to ***Wischer***, this case squarely presents the supreme court with the opportunity to determine whether a defendant's conduct giving rise to punitive damages must have been directed specifically at the plaintiff. As noted above, WIS. STAT. § 895.85(3) states:

> The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward *the* plaintiff or in an intentional disregard of the rights of *the* plaintiff. (Emphasis added.)

In addition to the statute focusing on "the" plaintiff, "plaintiff" is specifically defined as "*the party* seeking to recover punitive damages." WIS. STAT. § 895.85(1)(c) (emphasis added). The district court in ***Boomsma***, 202 F. Supp. 2d

at 881, concluded, "the thing which must be practically certain is not harm in the abstract, or even harm to a certain class of people (e.g., other drivers on the road), but harm to the plaintiff."

We question the soundness of the conclusion that the defendant's conduct must knowingly be targeted at the particular plaintiff who eventually seeks punitive damages. In many situations, this literal interpretation of WIS. STAT. § 895.85(3) would manifestly defeat the purpose of punitive damages: to punish the wrongdoer and to deter similar conduct in the future. *See* ***Trinity Ev. Luth. Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789. Consider where a drug manufacturer publicly distributes a drug it knows is practically certain to cause harm. Even though the class of people who use the drugs are harmed and that the manufacturer knew this was practically certain to occur, the drug manufacturer could simply use the plain language of § 895.85(3)—language ***Wischer*** concluded was unambiguous—to preclude liability, arguing that it did not intend or know there was a practical certainty that *those particular plaintiffs* who are seeking to recover punitive damages would be harmed. Also, consider where a person fires a gun into a crowd of people and injures a stranger. How could the person have awareness that it is practically certain he or she would cause injury to someone he or she never knew?

## III. EXCESSIVE OR UNCONSTITUTIONAL PUNITIVE DAMAGE AWARD

If there was sufficient evidence to submit a punitive damages question to the jury, the next issue is whether the punitive damage award is either excessive or unconstitutional. As to the excessiveness ground, Hogner argues: (1) there was no rational relationship between the compensatory damages award of $2,000 and the punitive damage award of $225,000; (2) the ratio of the punitive

damages to civil or criminal penalties that could be imposed for comparable misconduct (imprisonment for not less than six months nor more than five years and a fine of not less than $600 nor more than $2,000) is unreasonable;[3] (3) the punitive damages award is excessive in light of his financial condition; (4) and because the Strenkes asked for $25,000 in punitive damages but then received $225,000, the award was based upon passion and prejudice. *See* ***Apex Elec. Corp. v. Gee***, 217 Wis. 2d 378, 390, 577 N.W.2d 23 (Ct. App. 1998).

As to the constitutional ground, Hogner argues the punitive damages award violates his due process rights. *See* ***id.*** at 389. "[T]he due process clause of the Fourteenth Amendment imposes substantive limits on the size of punitive damage awards." ***Id.*** Due process is violated "if a punitive damage award inflicts a penalty or burden on a tortfeasor that is disproportionate to the wrongdoing or exceeds what is necessary to serve the purposes of punitive damages." ***Id.*** at 389-90. Courts consider three factors when determining whether punitive damages violate due process:

> (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases.

***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 627, 563 N.W.2d 154 (1997).

In view of these factors, Hogner argues the award of $225,000 was substantially more than necessary to serve the penalizing and deterring purposes of punitive damages. On the other hand, as the Strenkes point out, past jail terms and

[3] These penalties are taken from WIS. STAT. § 346.65(2)(e) (1997-98), the operative statute at the time the underlying accident in this case occurred.

fines were insufficient penalties to deter Hogner from operating a motor vehicle under the influence for a fifth time.

## IV. BIFURCATING COMPENSATORY DAMAGES FROM PUNITIVE DAMAGES

The final issue involves the Strenkes' cross-appeal: whether the trial court erred by bifurcating the compensatory damages from the punitive damages matter. Claims, not issues, can be bifurcated provided they are tried before the same jury. ***Waters v. Pertzborn***, 2001 WI 62, ¶35, 243 Wis. 2d 703, 627 N.W.2d 497. Here, there is no problem with "the same jury" requirement or the same five-sixths requirement. The crux of this issue is whether compensatory and punitive damages are indeed separate claims that can be bifurcated. The Strenkes contend they are not because they arise from the same factual background, as compared to, say, a underinsured motorist claim and bad faith claim. *See* ***Dahmen v. American Fam. Mut. Ins. Co.***, 2001 WI App 198, ¶20, 247 Wis. 2d 541, 635 N.W.2d 1 (underinsured claim and bad faith claim can be bifurcated). Hogner, on the other hand, stresses the different natures of compensatory and punitive damages and the different burdens of proof. While compensatory damages focus on the Strenkes' loss, punitive damages focus on Hogner's conduct. Moreover, compensatory damages must be proved by a preponderance of the evidence, while punitive damages must be established by clear and convincing evidence.

If compensatory and punitive damages are separate claims, the attendant issue of whether the trial court erroneously exercised its discretion by bifurcating the claims arises. *See* ***id.*** at 548 (bifurcation left to trial court's discretion). The trial court "must consider the potential prejudice to the parties, the complexity of the issues, the potential for jury confusion and the issues of convenience, economy and delay." ***Id.***

Whether the court of appeals and federal district court have correctly stated the law on Wisconsin's punitive damages statute is a matter of substantial importance. This case, along with the ***Wischer*** case, gives the supreme court ample opportunity to address Wisconsin's law on punitive damages. Further, it would be appropriate for the supreme court to determine whether bifurcation of compensatory and punitive damages is permitted.